EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103483/2020

Hearing held in Glasgow (remotely) on 28 - 30 September 2021
Deliberations 4 October 2021

Employment Judge D Hoey

Mr P Carney	**Claimant** **<u>Represented by:</u>** **Ms Loraine (counsel)** **Instructed by Messrs Unionline**
Amey Services Ltd	**Respondent** **<u>Represented by:</u>** **Ms Watson (Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The claimant was unfairly dismissed.

(2) Compensation in respect of his unfair dismissal should be paid by the respondent to the claimant for the following sums:

a. A basic award in the sum of £1,804.86 (ONE THOUSAND EIGHT HUNDRED AND FOUR POUNDS AND EIGHTY SIX PENCE) (comprising a basic award of £2,005.40 less 10% contribution (£200.54)); and

b. A compensatory award in the sum of £3,225.69 (THREE THOUSAND TWO HUNDRED AND TWENTY FIVE POUNDS AND SIXTY NINE PENCE) (comprising a compensatory award of £3,584.09 (£500 for loss of statutory rights, wage loss in the sum of £2,937.23 and pension loss in the sum of £146.86) less 10% contribution (£358.40)).

The recoupment regulations apply to this award given the claimant was in receipt of a relevant benefit. The prescribed element is £3,084.09 less 10% for contribution (£308.40) which is £2,775.69. The prescribed period is from 17 February 2020 until 4 October 2021. The total unfair dismissal award is £5,030.55. The balance is £2,254.86.

REASONS

1. The claimant had raised a claim for unfair dismissal which was presented on 26 June 2020 with ACAS Early Conciliation beginning on 13 May 2020 and ending on 28 May 2020.

2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimant and the claimants' agent and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. Breaks were taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

Case management

3. The parties had worked together to focus the issues in dispute and during the hearing had provided a statement of agreed facts. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal

in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

Issues to be determined

4. The issues to be determined are as follows.

a. Has the respondent established that the reason for the claimant's dismissal was a potentially fair reason, namely matters relating to conduct?

b. Did the respondent genuinely believe in the claimant's guilt?

c. Did the respondent have reasonable grounds to sustain a belief in the claimant's guilt?

d. Did the respondent conduct a reasonably fair investigation into the alleged misconduct?

e. Did the respondent follow a reasonably fair procedure in relation to the claimant's dismissal?

f. Was the final written warning imposed upon the claimant on 20 February 2019 manifestly inappropriate so that the Tribunal is able to 'look behind' it in assessing the fairness of the dismissal?

g. Was the decision to dismiss within the range of reasonable responses?

h. If the dismissal is found to be fair due to a failure to follow a fair procedure, should a **Polkey** deduction be made to the claimant's compensation and if so in what amount?

i. If the dismissal is found to be unfair, should the claimant's compensation be reduced on the basis that the claimant contributed to his dismissal, in that he committed culpable or blameworthy conduct which in part caused his dismissal? If so by what amount?

5. The agents had advised the Tribunal that neither party was arguing that there had been any unreasonable failure to follow the ACAS Code (and there were no submissions on this point).

Evidence

6. The parties had agreed productions amounting to 160 pages.

7. The Tribunal heard from Mr Hastings (the manager who imposed the final written warning), Mr Shevlin (investigating officer), Mr Gill (dismissing officer), Mr Egan (appeal officer) and the claimant. The witnesses were each asked appropriate questions.

Facts

8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence. making a decision as to what was more likely than not.

Background

9 The respondent's business involves consulting and infrastructure support services. It has different depots. The claimant worked at the Bargeddie depot in Glasgow. In total the respondent employs over 18,000 people in the UK. The respondent is supported by an HR function.

10 The claimant was employed by the respondent as a Highways Maintenance Operative between 12 January 2015 and 17 February 2020. His role required him to operate a number of different pieces of machinery, including gritting tractors, loading shovels and forklifts.

11 The claimant reported to highway supervisors, who included Mr Shevlin and Mr O'Donnell, whom the claimant would see daily. Mr Pilkington was operations manager to whom the supervisors reported. He in turn reported to Mr Struthers, construction manager. There were other managers on site at the same level as Mr Shevlin and Mr O'Donnell.

Policy documents

12. The disciplinary policy which applies to all of the respondent's employees was stated to exist to "ensure consistent and fair treatment for all employees and to provide a defined process for alleged disciplinary issues to be resolved." The policy stated that an investigation would be carried out to establish the full facts of each case. Employees would not normally be dismissed for a first breach of discipline except in cases of gross misconduct.

13. Misconduct was defined as minor breaches of contractual terms or company rules or policies. Gross misconduct was serious breaches of contractual terms or company rules or procedures. Examples included deliberate or malicious damage, fraud, serious negligence which causes unacceptable loss damage or injury.

14. The outcome of a disciplinary hearing can be a verbal warning (for minor offences(, first written warning (for a more serious disciplinary offence) or final written warning (which is "*where a serious disciplinary offence amounting to gross misconduct has been committed thereby justifying summary dismissal but the company decides after taking into account all appropriate circumstances that a lesser penalty is appropriate or where the employee commits further disciplinary offences or where the misconduct is sufficiently serious to warrant it*").

15. If there are further acts of misconduct following a final written warning the employee may be dismissed. The disciplinary manager has a discretion in such an event. A final written warning will normally last for 18 months.

16. Employees of the respondent are subject to rules contained in a 'Drivers Book' which states that: "*any damage or loss due to improper driving or negligence on the part of a driver may become subject of disciplinary action*".

Claimant raises a grievance against his managers

18 After a year or so of his employment having commenced the claimant was unhappy with how he perceived he was being treated by his managers. He

was concerned that he was not being given a fair opportunity to be trained nor did he feel he was given sufficient opportunity to work overtime. He believed he was being bullied by his managers and his mental health was suffering.

19 The claimant raised matters informally with Mr Struthers in April 2018 arguing that his supervisors, Mr Shevlin and Mr O'Donnell were not treating him fairly and his manager, Mr Pilkington, had failed to deal with it appropriately.

20 On 21 November 2018 the claimant raised a grievance with HR citing unfair treatment by Mr Shevlin, Mr O'Donnell and Mr Pilkington. He was not happy with how he had been treated nor how Mr Struthers had dealt with matters.

21 Mr Pilkington took control of the grievance and met with the claimant on 17 December 2018. The claimant believed he was being invited to an informal meeting and did not realise the meeting was to be treated by the respondent as a formal grievance meeting. The claimant did not have his union representative present. At the meeting the claimant said he believed he had been treated unfairly with regard to training. Mr Pilkington told the claimant he believed the claimant had been in receipt of more training than the majority of operatives.

Gross misconduct investigation

22 On 7 December 2018 the respondent commenced a disciplinary investigation into allegations of misconduct by the claimant. These allegations were that the claimant had caused damage to the respondent's vehicles and plant on 10 February 2018, 24 August 2018, 18 November 2018 and 7 December 2018.

23 They were raised on 7 December 2018 because that was when the respondent decided to investigate the matters. There was no explanation as to why it had taken so long to commence an investigation into these matters given the passage of time since the first incident.

24 The investigating manager was Mr Shevlin, Highway Supervisor. Mr Shevlin was appointed to investigate because he was around at the time the

respondent chose to investigate matters. It is not clear why another manager, who was not involved with the claimant, was not asked to investigate.

25 The claimant attended an investigatory interview with Mr Shevlin on 13 December 2018. At that meeting the claimant was asked to explain each of the incidents. He was told that the meeting had been convened because of the seriousness of the 4 incidents. There was no suggestion any one incident was gross misconduct.

26 With regard to the first incident, which happened on 10 February 2018, the claimant said the vehicle he was driving had rivets missing which caused the accident.

27 With regard to the second incident, which happened on 24 August 2018, a gate had been taken off its hinges when the claimant was operating a forklift which the claimant had immediately repaired. It had been an accident following a minor error by the claimant.

28 With regard to the third incident, which happened on 18 November 2018, the claimant had struck a guardrail when driving a mini tractor. The claimant explained that was his first time driving such a vehicle and he had accidently driven too far forward. He had “nicked” the barrier which was immediately fixed with no damage or injuries sustained. He had not driven that type of vehicle before but he recalled using the vehicle to grit the yard. It was a minor error.

29 The fourth incident happened on 7 December 2018 when operating a loading shovel which had struck a gritter. Mr Shevlin said there had been “a serious amount of damage”. Mr Shevlin showed the claimant photographs which appeared to show damage to the footwell, wheel arch, wheel hubs and loading shovel. The claimant explained that he had not hit the vehicle hard enough to cause such damage. He said he was 100% honest in his witness statement at the time (which stated he had been driving around 2 miles per hour and scraped the stairwell of the gritter). There had been no other damage. The claimant believed the damage was minor, a scrape.

30 The claimant explained that the yard had been congested and there was limited space to manoeuvre. The claimant said he has been reversing and overcorrected the steering. When he turned his wheel to correct the error the vehicle moved forward and he heard the "crunch" and stopped. He immediately reported the incident.

31 The claimant was asked if there was anything else he wished to say about the incidents. He said there were all minor and he was confident in his abilities. The claimant said the incidents looked worse in the photos than in real life. The damage was minor and he had made minor errors.

32 With regard to the damage following the fourth incident, the claimant said he believed the vehicle had been damaged after the claimant had caused the minor damage.

33 The claimant also said that there had been 10 alleged incidents by other staff recently in this and a neighbouring depot where vehicles had been damaged. He asked if those responsible would be investigated in the same way he had been. Mr Shevlin told the claimant that the investigation was only in relation to the 4 incidents in question and not others. The claimant believed he was being treated more harshly than others who had also made minor errors.

34 Mr Shevlin did not have any statements in respect of others in connection with the incidents. Mr Shevlin concluded that the allegations ought to proceed to a disciplinary hearing.

35 He compiled an Investigation Report. The only person interviewed in connection with the 4 incidents was said to be the claimant. The report noted that the suggested disciplinary hearing manager should be Mr Pilkington and suggested appeal hearing manager should be Mr Struthers.

Outcome of grievance

36 Following the meeting the claimant had with Mr Pilkington, Operations Manager, on 17 December 2018 to discuss his grievance, on 27 December

2018, Mr Pilkington wrote to the claimant and told him his grievance was not upheld. The claimant was given the right to appeal. He did appeal.

Claimant to attend disciplinary hearing re possible gross misconduct

37 On 28 December 2018 Mr Pilkington invited the claimant to attend a disciplinary hearing on or around 9 January 2019. The purpose of the meeting was "to discuss the following allegation(s): On 4 occasions since February 2018 you have driven company vehicles/plant without due care and attention, causing damage to both street furniture in and around the depot and to the vehicles themselves and as stated in the Driver Handbook any damage or loss due to improper driving or negligence on the part of the driver may become subject of disciplinary action by Amey:

1. Incident involving damage to rear cape of 3.5t transit van on 10 February 2018

2. Incident involving forklift truck and damage to premises on 24 August 2018

3. Incident involving winter tractor and pedestrian guard rail within depot on 18 November 2018

4. Incident involving loading shovel and gritter within depot on 7 December 2018."

38 The letter enclosed the disciplinary policy, extract from driver handbook, photographs of damage, investigatory minutes and damage reports. The letter stated: "Please be advised that the allegation(s) above could be deemed as constituting gross misconduct. If the allegation(s) are proven at the hearing you may be summarily dismissed."

Claimant summarily dismissed

50. Mr Pilkington decided to dismiss the claimant following the hearing, with the claimant's dismissal effective from 9 January 2019. He issued his outcome letter on 14 January 2019. The letter stated that "Your dismissal was on the

grounds of conduct amounting to gross misconduct that was sufficiently serious to entitle us to dismiss you without notice."

Appeal against dismissal

51 The claimant appealed against his dismissal on 17 January 2019 arguing that the proper procedure had not been followed and the outcome was disproportionate to the offence.

52 The claimant's appeal was heard by Mr Hastings, Principal Construction Manager. The appeal hearing took place on 8 February 2020.

53 At the hearing the claimant explained that there should have been a proper investigation into each incident. There had been no procedure at the time and no warnings issued to allow him to improve. The managers in question had not been interviewed at the time and only the claimant's reports had been considered. Those who had investigated the matters should have given a statement which was provided to the claimant to comment upon.

54 The claimant also explained that he had a live grievance with regard to his managers since November 2018 and was awaiting to hear from the respondent. Mr Hastings decided to adjourn the meeting to get advice.

55 The meeting was reconvened on 20 February 2019. Mr Hastings opened the hearing by saying there had been 4 incidents where damage had been caused, which the claimant admitted but for the first 3 incidents no (reasonable) investigation had been carried out. A statement should have been taken to allow the claimant to comment and sign off as accurate. Mr Hastings said he would have expected there to be a sanction for at least the second incident and after the third incident but he concluded that the respondent had failed to properly investigate them and he decided to overturn the dismissal and reinstate the claimant. However, he decided to impose a final written warning.

56 Mr Hastings was told that there was an inconsistency in approach as other employees had been guilty of similar conduct with no sanction. He was told

that the final warning was severe. Mr Hastings stated: "*The severity of the last incident is the reason why the formal written warning was put in place. The incident could have caused injuries or even fatalities*". When asked if there was any way the penalty could be reduced Mr Hasting said he would speak to HR as "*it was my thought that due to the severity of the incident the final written warning should be in place*". The outcome was that the claimant would be reinstated and given a final written warning to be in place for 18 months. He was told he would have the right to appeal if he believed he was treated unfairly.

57 Mr Hastings had not given the claimant an opportunity to present his position with regard to the facts of the fourth incident or the severity of sanction. Mr Hastings had decided to issue a final written warning based upon what Mr Shevin said the damage had been which he assumed was accurate. He took no steps to verify what Mr Shevlin said was correct or consider the claimant's position that the damage was significantly less than what was presented. He had omitted to consider the claimant's argument that the damage was in fact minor (and the photographs that Mr Hastings had relied upon included damage caused by someone other than the claimant).

58 Mr Hastings believed that a final written warning was appropriate because of the fact this was the fourth occasion when damage had been caused and the vehicle was larger with more damage. Mr Hastings had not considered the full facts behind each of the 3 incidents and was not fully aware of the actual damage caused in respect of the fourth incident.

59 Mr Hastings issued his outcome letter on 20 February 20219 confirming he had decided to overturn the claimant's dismissal and the claimant was reinstated to his employment. Mr Hastings decided to issue the claimant with a final written warning in respect of the allegation that the claimant had caused damage on 7 December 2018. The letter stated that "due to the series (sic) nature of the fourth incident I have decide that you should receive a final written warning which will be held on file for 18 months." Contrary to what he told the claimant, the letter said that that there was no further appeal.

Outcome to claimant's grievance

60 Mr Kelly, Operations Manager, wrote to the claimant on 27 June 2019 with the outcome of his grievance following a meeting that took place on 12 June 2019. Mr Kelly noted in relation to the original grievance hearing that the respondent had not followed its grievance procedure correctly. The claimant had understood the meeting with Mr Pilkington was an informal meeting, not having received a formal invite letter. That part of his grievance was upheld.

61 His grievance about unfair treatment as to training was not upheld due to the training the claimant had been given. The grievance about overtime treatment was also not upheld as this had bene distributed fairly.

62 Mr Kelly proposed a reconciliation meeting with Mr Pilkington, Mr O'Donnell, Mr Shelvin, Mr Struthers and himself.

63 The claimant appealed against the outcome of the grievance but the Tribunal was not given the appeal letter and the claimant had been dismissed prior to any appeal being fixed.

Another disciplinary investigation against claimant

64 On 2 October 2019 the respondent commenced a further disciplinary investigation into an allegation of misconduct by the claimant. The allegation was that the claimant had caused damage to a third party vehicle while unloading items with a forklift. The investigating officer was Mr Shevlin.

65 Mr Shevlin was appointed because he was around at the time but no consideration was given to the fact that Mr Shevlin had been involved in previous matters that had not been favourable towards the claimant nor that the claimant had a perception that he had been and was being treated unfairly by Mr Shevlin.

66 At the time Mr Shevlin had been asked to investigate the matter, the claimant had been pursuing a grievance against him. There were other equally senior managers available at the time who had no involvement or issue with the claimant on site who could have investigated matters.

67 On 2 October 2019 the claimant had operated a forklift to unload a lorry. The pallets were poorly stacked and the operation was more difficult than usual. The claimant had asked the lorry driver to keep watch for him and the lorry driver had assisted the claimant in the operation. The claimant completed his part of the task without any issue being raised by the lorry driver.

68 A second operative, Mr McBride, then continued to unload the lorry using the same forklift and the claimant left. Although the claimant was qualified to operate the forklift truck, Mr McBride had not completed his training and was not qualified to operate that vehicle.

69 Mr McBride finished unloading the lorry and at some point after this, Mr Struthers noted that the lorry driver was standing on the trailer of the lorry. He asked someone to find out what he was doing. The driver alleged that someone had damaged the lorry. Mr Shevlin was asked to investigate matters. He asked the driver who was responsible. Mr Shevlin took a brief statement which said the driver believed it was the claimant who was responsible. The specific alleged damage was not identified at that time.

70 The lorry driver in trying to fix the damage used a crow bar on the vehicle. Other workers from the respondent attended and attempted 'repairs'. After about 15-20 minutes, photographs were taken of the lorry which showed damage to the side curtain and apex rail There was no evidence showing what, if any, damage existed prior to the driver and others working on the vehicle and prior to the photographs being taken.

71 The claimant believed he was being held responsible for damage which he had not caused and requested to review CCTV of the incident on 2 October 2019. He made a further written request to Mr Struthers on 4 October 2019. In his email to Mr Struthers the claimant stated: *"I have been advised by my full time official to make you aware that on 2 October 2019 at approximately 1045am I requested to see the CCTV footage of the yard regarding this alleged accusation to Mr Shevlin. He responded by saying "there was no one who could work the cameras". I then asked the same question later on around*

430 and I was told the same. I asked again on 3 October at 8am to be told the same reply. My union is insistent of seeing this footage".

72 The CCTV was available and was in fact viewed by Mr Struthers but was never provided to the claimant and was not reviewed by Mr Shevlin as part of his investigation. Mr Struthers told Mr Shevlin when he was preparing his report that the CCTV did not show the incident in question due to sun glare and Mr Shevlin recorded that in his report (without disclosing it was Mr Struthers who had said this and without viewing it himself).

73 Mr Shevlin completed an investigation report. He stated that he had interviewed the driver of the vehicle, Mr Miller (another operative) and Mr McBride (an operative who had worked the forklift after the claimant) and the claimant.

74 The key points arising was that prior to the incident being reported by the driver, the curtain side of the vehicle operated without issue but following the incident the curtain could no longer pass where the rail was damaged. There were said to be 2 statements saying the claimant caused the damage together with photographic evidence. The report said "*both statements and evidence substantiate enough material to progress to a disciplinary*."

75 The report stated that: "*No CCTV evidence due to direct sunshine in the camera. The claimant can be seen on the forklift but disappeared in the sun glare as he nears the truck*". This was not something Mr Shevlin knew but was something he was told by Mr Struthers. Mr Shevlin did not verify what he was told nor reveal that it was in fact Mr Struthers who had told him this to the claimant. The report read as if it was Mr Shevlin who had viewed the camera (and no mention was made of Mr Struthers)

76 The allegation was said to be that on 2 October 2019 a "delivery vehicle side curtain rail was damaged by forklift truck." This was stated although there was no evidence as such showing that the damage had in fact been caused by a forklift truck.

Investigation

77 The claimant attended an investigatory interview with Mr Shevlin on 15 October 2019. The claimant denied the allegation. He asserted that the damage could not have been caused by a forklift relying on the photographs and one specific photograph in particular. The nature of the damage was such that it was highly unlikely that a forklift truck could have caused it.

78 No minute of the meeting with Mr Shevlin and the claimant of 15 October 2019 was produced to the Tribunal. At that meeting the claimant told Mr Shevlin that Mr McBride had carried out the same operation as he had and yet Mr McBride was not qualified to do so.

79 Mr Shevlin believed that he had uploaded all the photographs onto an HR portal which could be viewed by the disciplinary manager. One photograph was not provided to the claimant. This photograph showed that damage was unlikely to have been caused by a forklift truck.

80 While the Tribunal was not given copies of the material obtained as part of the investigation, such as the photographs and statements obtained, the statement from driver was very brief and suggested that it was the claimant who had caused the damage. No explanation had been given (nor questions asked) about why this had not been reported at the time (either to the claimant or anyone else) nor why the driver had allowed the operation to continue and allowed another forklift operator to continue unloading the vehicle (and allowed others to seek to repair damage, which could have worsened the damage). The driver was not asked to state precisely what the damage was that the claimant was alleged to have caused nor how he had done so.

81 A statement from Mr Miller (another operative) was also obtained. He did not report anything at the time and gave a statement several hours later to Mr Shevlin claiming to have witnessed the claimant causing damage from a distance. Mr Miller had complained about Mr Shevlin. He gave inconsistent accounts as to how and why he made that statement, indicating at one stage that he had been coerced into doing so. Mr Miller had not been asked why he had not raised this matter at the time.

82 While it was suggested that Mr McBride had given a statement, this was not provided to the Tribunal nor were its contents discussed. He had not seen the claimant cause any damage. The investigation report focussed on the claimant as the cause of the damage rather than seeing to identify how the damage had been occasioned. The report did not mention how the CCTV had been viewed, that another forklift operator had worked on the lorry (who was not qualified to do so) immediately after the claimant nor that the photographs were taken after the lorry had been worked upon by the driver (with a crowbar) and other workers.

83 The claimant was invited to attend a disciplinary hearing on 22 January 2020. The allegation was that the claimant had "damaged a delivery vehicle while unloading". The disciplining officer was to be Mr Gill. The claimant was given statements from the driver, Mr Miller, Mr McBride and the claimant together with photographs and signed minutes. The letter noted that if there was a live final written warning, dismissal could be an outcome.

Disciplinary hearing

84 The disciplinary manager was Mr Gill, Assistant Construction Manager. The claimant was accompanied by his trade union representative. The hearing began by it being alleged that Mr Shevlin should not have been involved in the investigation as there had been a live grievance about bullying and harassment involving him. It was also noted that Mr Struthers had been present and yet no statement had been taken from him.

85 Mr Gill was told that there were other similar cases at the depot and a nearby depot where no sanction had been administered. Mr Gill indicated that he would focus on the claimant's situation and not other individuals.

86 The claimant explained that he had completed the manoeuvre on the day in question with the assistance of the driver. He suggested if damage had been caused it would have been stated by the driver immediately who would not have allowed the operation to continue.

87 The claimant noted that Mr Miller's statement suggested he had seen the claimant cause damage and shouted to the claimant. The claimant had not heard anything from Mr Miller. Mr Miller was in the process of leaving the respondent.

88 Mr Gill stated that he could not say for certain how the damage was caused but he had to determine if the initial damage was caused by the claimant.

89 Mr Gill was told that the damage was not consistent with forklift damage since both curtain rails had not been bent it was only the top one. It was noted that the CCTV could assist. It was suggested that it was possible the vehicle could have been damaged upon entry to the site. Mr Gill did not know about the CCTV nor why there was a delay in responding to the claimant's request. He believed the CCTV had not been working.

90 The claimant noted that no one can confirm that the driver had not caused the damage. He noted that the statements did not "add up" since the damage could not have been sustained following contact with the forklift prongs. He suggested the damage could have been done by those trying to repair it.

91 The claimant noted that the operative who completed the work on the lorry was not qualified to drive a forklift but he had completed the job in any event.

92 Upon being told that Mr Shevlin had been alleged to bully and harass him, Mr Gill said that had not compromised the investigation as the witnesses signed their statements. The claimant noted that Mr McBride had only repeated what the driver said rather than anything he saw and that the other operative had raised issues about Mr Shevlin before.

93 The claimant suggested that Mr Struthers was orchestrating matters but no statement had been taken from him.

94 Mr Gill asked what the driver would gain by falsifying damage to which the claimant said it would protect himself. The claimant said Mr Shevlin told him he was guilty.

95 Mr Gill was told that there was a photograph missing from those present during the investigation stage. That had been photograph that Mr McBride had been able to confirm showed the damage could not have been caused by a forklift. The damage was more consistent with having happened coming round a corner trying to square up. The marks were not vertical in the shape of the forks.

96 Mr McBride who had attended the meeting said that Mr Shevlin had told him "everything else here is irrelevant what we have here is two on one".

97 Mr Gill was told that the investigation was flawed and the claimant's livelihood was on the line. The claimant believed the investigation was unfair. Mr Gill was told that the grievances against the investigation officer should have been raised together with the lack of consistency

98 Mr Gill adjourned the disciplinary hearing to consider his decision.

Claimant issued with a warning and therefore dismissed

99 Mr Gill reconvened the meeting on 17 February 2020. He said that there was no CCTV data given the time that had passed. He concluded that the allegation against the claimant was well-founded. He had 2 statements saying the claimant was responsible and a third saying the driver told him it was the claimant. He believed the vehicle would not have been driven if it was not roadworthy, and so the damage was not likely to have been caused prior to arriving at the depot.

100 He felt there was not gross misconduct but "*negligence has been demonstrated in the use of the forklift truck which caused damage to a third party vehicle*". He decided that the appropriate sanction was a written warning and as the claimant had a live final written warning on his file, Mr Gill decided that the claimant should be dismissed with pay in lieu of notice. Mr Gill believed that where there was an outstanding final written warning and another warning was imposed, dismissed was the only option.

101 The claimant asked that comments be noted in the minute. It was stated that the decision was made from 2 witness statements and an improper

investigation when a live grievance existed against the investigator. No minutes existed from the meeting the claimant had with Mr Shevlin on 15 October 2019 an Mr Struthers made a comment about the claimant. The CCTV was not given to the claimant. A proper investigation had not been carried out with a photograph missing showing the damage was not caused by a forklift.

102 Mr Gill followed up in writing on 19 February 2020 confirming that he concluded the claimant was responsible for the damage and 2 statements had confirmed the claimant was responsible. A warning was appropriate and as the claimant had a final written warning dismissal was the outcome. Mr Gill said: "*I do not feel you have provided enough evidence to the contrary of the reasons above*". He was told he could appeal.

103 The claimant's employment terminated on 17 February 2020.

Appeal against dismissal

104 The claimant appealed his dismissal arguing the decision was based on a flawed final written warning that had arisen because a person against whom the claimant had raised a grievance had investigated matters and the investigation was flawed. It was argued that the investigation that led to his dismissal was flawed with incomplete evidence provided.

105 The appeal manager was Mr Egan, Account Director, and an appeal hearing took place on 26 August 2020. The claimant again raised concerns about the investigation including the fact Mr Shevlin was not impartial and his prior grievances and unfair dismissal, failure to provide CCTV, the missing photograph, inconsistency of treatment and other potential causes of the damage including that it could have been pre-existing, caused by attempted repairs or by Mr McBride whom the claimant alleged was not a qualified operative.

106 The claimant had indicated that he believed the previous incidents were used "to sack him" but Mr Egan indicated that he was not discussing the previous incidents and focussing instead on the act that led to the dismissal. The

claimant reiterated the points he had made at the original hearing, including that no one could identify what the damage was that he was alleged to have caused due to the way the investigation had been conducted. The claimant explained that he believed other staff had been responsible for similar incidents and yet had received a "talking to" and asked not to do it again. The claimant said he would provide Mr Egan with specific examples which Mr Egan would consider.

107 The claimant also argued that the final written warning that had been issued was flawed.

Appeal dismissed

108 Mr Egan adjourned the appeal hearing to consider the matter and provided his outcome by letter dated 21 September 2021. Mr Egan did not uphold the claimant's appeal. He considered the names the claimant had provided but did not consider the circumstances to be comparable. He did not provide any detail pertaining to the results of his consideration to the claimant. His outcome letter stated that: "*Following your appeal hearing I have taken statements from additional members of staff who claim that your recollection of conversations which happened following the incident which substantiate your allegation that the investigation was predetermined are incorrect. … Following further investigation it appeared many of these incidents [relating to other individuals being treated differently in similar circumstances] were not recent from within the last two or three years. I was unable to find evidence that the level of sanction was inappropriate or inconsistent*." The appeal was dismissed.

109 The additional statements to which Mr Egan refers were from Mr Struthers and Mr Shevlin which were taken on 21 September 2020. The details of these statements were not provided to the claimant. Mr Struthers said he had seen the lorry driver on his vehicle and had asked that the matter be investigated. Mr Shevlin said Mr Struthers asked him to investigate the matter. Mr Shevlin said Mr McBride had been operating the forklift but he said it was the claimant who had caused the damage which was what the driver told Mr Shevlin.

Findings of fact in respect of contributory fault

110 With regard to the events that occurred on 7 December 2018 the claimant had been negligent. Upon seeking to recorrect his steering during the manoeuvre, his vehicle had collided with a stationery vehicle and caused minor damage. It was conduct for which the claimant was blameworthy and contributed to his dismissal.

111 With regard to the events that occurred on 2 October 2019, it was more likely than not that the damage that was caused to the lorry was caused by someone other than the claimant. It was more likely than not that there was no damage at all in place when the claimant worked on the lorry. The Tribunal finds that the claimant did not cause the damage relied upon.

Post dismissal earnings

112 The claimant earned £343.13 net per week with the respondent, £401.08 gross. His weekly pension entitlement was £146.86. He was aged 29 at his dismissal with 5 complete years' service.

113 He secured comparable alternative employment shortly following his dismissal such that his loss of earning were £2,937.23. The claimant did receive a relevant statutory benefit following his dismissal, such that the recoupment regulations apply.

Observations on the evidence

114 The Tribunal found that the witnesses did their best to recall matters and that no witness had sought to misrepresent the position or mislead the Tribunal. There were, however, a number of concerns.

115 **Mr Shevlin** did his best to assist in providing evidence as to what happened and was broadly clear. He was, on occasion, defensive in his approach. For example, he was asked if the photographs he had seen could not show the damage the claimant had been alleged to have created to which he said he could not say without seeing the photographs. The question had been asked to highlight the fact that the photographs had been taken 15 to 20 minutes

after the claimant had ceased to work on the vehicle after another operative had worked on it and after the driver and others had tried to repair the damage with tools, including a crowbar. Mr Shevlin did not need to see the photographs to answer that question.

116 Mr Shevlin was candid and prepared to make appropriate concessions. He agreed, for example, that he "possibly" should have viewed the CCTV rather than rely upon what he was told it showed, given he was the investigator.

117 The Tribunal found it surprising that he was unable to say whether or not Mr McBride was not trained to operate forklifts given Mr Shevlin's role and given the claimant's position during the final disciplinary process, in which Mr Shevlin was investigator. Mr Shevlin was responsible for investigating the cause of the damage to the vehicle on which the claimant and Mr McBride had worked. Mr Shevlin confirmed in his investigation report that the claimant was trained to operate the forklift but was unable to say whether or Mr McBride was competent in that vehicle. Given Mr Shevlin appeared to believe that the damage to the vehicle had been caused by a forklift truck, and given the claimant had told Mr Shevlin (such as at the meeting on 15 October 2019) that Mr McBride was not qualified to operate the forklift, no reason was provided for Mr Shevlin not considering this issue.

118 Mr Shevlin had focussed his investigation in relation to the claimant and his report identified the facts that he believed supported the claimant's guilt rather than focussing more generally on what could reasonably have caused the damage. In cross examination Mr Shevlin accepted that he had not referred in his report to how he was able to say what the CCTV showed (since he relied on what he had been told by Mr Struthers rather than check it himself or let the claimant see it). He also did not refer to the fact Mr McBride may not have been as qualified in the use of the forklift than the claimant nor that there were other potential sources of the damage, including that some damage could have been pre-existing or that Mr McBride was carrying out the same operation as the claimant or that the photographs had been taken

after the driver and others had worked on the vehicle, potentially making any damage worse.

119 Unfortunately the opportunity was missed at the investigation stage of fully setting out what could have happened (and leaving matters to the disciplinary manager to determine the cause). Mr Shevlin focussed instead on proving the claimant's guilt. The Tribunal was not given the statements of the driver or the colleague that Mr Shevlin took.

120 **Mr Hastings** was candid in his approach and gave honest answers. He conceded, for example, that when he was dealing with the claimant's appeal against his dismissal, which was in relation to procedure and the disproportionate nature of the sanction, he failed to give the claimant an opportunity to make points about the mitigation in relation to the incident he upheld and did not consider the reason why the claimant argued the sanction was disproportionate in relation to the fourth matter. He conceded that he made his decision on the basis of the information that he had been given without affording the claimant the opportunity to address him on issues about the incident, its severity or the sanction.

121 Mr Hastings also accepted that the damage which he believed had occurred (and on which he based his decision) was believed by the claimant to have been more severe than the damage the claimant actually caused. This created an issue since Mr Hastings's evidence was that one of the key reasons why he decided to impose a final written warning was because of the damage Mr Hastings believed had been occasioned. He accepted that he had not in fact considered the actual damage caused (despite the claimant saying, at the time, that the damage was minor). He said in cross examination that he believed a final written warning was appropriate because the vehicle in question was large and caused more damage, but had to concede he had not in fact considered what the specific damage was.

122 Mr Hastings was also asked if the 4 incidents were of the same character which he disputed. He was asked if they were all minor errors of judgment.

His view was that there were "only so many minor errors of judgment. To me it was more of a didn't care attitude than minor errors of judgment. He kept doing it." The difficulty with that was that Mr Hastings had not in fact fully investigated the first three incidents and did not have all the facts before him (which was why he overturned the decision to dismiss the claimant). The claimant's position was that there were reasons for the errors in question which, the claimant maintained, explained why the incident occurred. Had Mr Hastings that information before him, he may have reached a different conclusion given his reliance on the previous incidents.

123 **Mr Gill** was also candid in his approach and did his best to recall how matters had developed. The difficulty Mr Gill faced was that he proceeded on the basis of the investigation report that had been provided to him, which had focused solely on the claimant rather than the full factual matrix.

124 Mr Gill conceded that the failure to look at other similar incidents which the claimant said led to no sanction was "a concern". His position, along with the other individuals, was that he had taken internal advice at all times. He also conceded that there was a concern in having someone investigate the issues where that person had previously faced a grievance from the person who was being investigated.

125 Mr Gill accepted that "it was very difficult to conclude the forklift caused all the damage" but believed his function was to ascertain if the claimant had caused damage. He accepted that he could not say what the initial damage was that the claimant was alleged to have caused since there were no photographs of it and he was not present (and there was in fact no evidence before him, other than what the claimant said, as to what the position was when the claimant was completing the operation).

126 Mr Gill gave evidence that he believed there was no CCTV footage. He thought the cameras had not been working and then when shown what the investigation report said gave evidence that Mr Pilkington had told him there was no footage available. He candidly conceded that there was a "major

problem" in not providing the claimant access to the footage and had he known the detail, he would have "looked into it in more detail".

127 He also conceded that the statement Mr Shevlin took from the driver (which was not before the Tribunal) was "very brief" and "in an ideal world I would have liked more information from the driver". He did not know, for example, that it was the driver who had given the claimant directions during the operation to remove the items from the vehicle.

128 **Mr Egan** gave evidence in a candid way. In places he was defensive as to his approach. For example he was not prepared to accept that there was no evidence of the original damage the claimant was said to have caused, despite it being obvious that there was no such evidence. He also maintained that it was not clear what sanction the claimant believed was reasonable in relation to the incident despite it being relatively clear that the claimant believed a "talking to" would have been appropriate, which was what the claimant said had happened to others for similar incidents. He was also unclear as to the position regarding CCTV despite what the report Mr Shevlin produced said.

129 Mr Egan was of the view that the damage could have been caused by a forklift and he said he had seen such damage before. He had made enquiries as to the CCTV but had been told by Mr Struthers "a few days after the appeal hearing" that the cameras were broken. The cameras were not broken given what the investigation report said.

130 Mr Egan also conceded after being asked to clarify the position that the claimant had raised an issue with Mr Shevlin being a proper person to investigate the issue as part of the appeal but this was not something Me Egan considered. Mr Egan conceded that he had not considered this part of the claimant's appeal. He also conceded that the fact Mr Shevlin had been the subject of a grievance by the claimant (and had been involved in proceedings that had led to his dismissal being overturned) meant that it was not in fact appropriate for him to have been the investigator.

131 While Mr Egan said he had looked into the examples of others who the claimant and his union representative had made similar errors and been treated differently, Mr Egan conceded that the outcome of his research was not information that was provided to the claimant. He indicated that "many" of the examples were historic and took place under a different management team. He did not believe any were of a similar nature to the incident in question. This contrasted with the claimant's position that he knew personally of some incidents that had happened on the site the claimant worked that were similar. As Mr Egan had not provided the details to the claimant, it was not possible to verify what had been said.

132 **The claimant** also sought to give his evidence in a candid way. He was clearly upset with how he perceived he had been treated and believed that there had been a concerted attempt to have him removed from his role. He was concerned about Ms Shevlin's approach to the investigation given the prior relationship. He believed that although he had raised his concerns informally with Mr Struthers in 2017, it was only when matters became formal in 2018 that his colleagues had begun to try and secure his dismissal. He did not believe that the trigger for his dismissal was the damage that had been caused but believed the respondent had put a "bullseye" on his back following the (what he perceived as flawed) final warning and then a manufactured situation that led to a warning being applied and his dismissal.

133 The claimant believed that he was being dismissed because of having lodged grievances against his managers. This was his view. However, the questions in this case were not whether his dismissal was fair, applying the legal principles and the Tribunal focusses on that, rather than whether or not the claimant was correct in his belief

134 With regard to **specific conflicts in evidence**, the Tribunal resolved these by considering what was more likely than not to be the case, by assessing the evidence before the Tribunal in terms of the oral evidence and the contemporaneous documents and other sources of evidence presented.

135 One dispute was whether or not Mr McBride was qualified to drive a forklift. The claimant was clear that Mr McBride did not have the "ticket" (in comparison to the claimant). None of the respondent's witnesses were able to confirm whether or not that was correct. That was surprising given the damage was alleged to have been caused by a forklift and Mr McBryde had been operating the forklift after the claimant and before the damage had been discovered. The Tribunal found it more likely than not that Mr McBride was not qualified unlike the claimant who was qualified to operate the forklift.

136 Another of the key factual disputes which the Tribunal required to resolve was whether or not the claimant was at fault with regard to the damage to the truck. That was pivotal with regard to the respondent's contribution argument. The Tribunal having assessed the evidence presented to it concluded that the claimant's position was to be preferred. There were a number of reasons for that.

137 Firstly the only evidence the Tribunal heard from persons who were present at the time was the claimant. There was no statement before the Tribunal from the driver or the others who were present at the time and they were not able to be cross examined. The claimant's evidence was consistent and clear and appeared to be truthful. There were no photographs before the Tribunal to challenge what the claimant said. Mr Gill had agreed that it was difficult (but not impossible) to conclude the damage was caused by a forklift.

138 From the evidence before the Tribunal it seemed more likely than not that the lorry had not been damaged by the claimant. The evidence before the Tribunal showed that where the claimant had been responsible for any damage he would raise this immediately. He had done so on other occasions. It appeared unlikely that the claimant would have caused damage, when the driver was present, and not admit to such damage, even where he knew he had a final written warning. It was unlikely that the driver would have continued with the operation (and involve Mr McBride) if the damage had been caused by the claimant. Had that been the case the driver would have told the claimant at the time and have told Mr McBride as soon as he took

over. That did not happen. It was also unlikely that the claimant would seek the CCTV immediately (and repeatedly) if he was at faut to any degree.

139 Had there been damage when the claimant was carrying out the operation he would have advised the driver about it at the time, who was assisting him with the operation. The driver had not raised anything with the claimant at the time.

140 There was more opportunity for the damage to have been caused following the claimant ceasing to work on the lorry. Mr Bride was less qualified than the claimant to conduct the operation which was challenging. The operation was not a simple one given the way the load had been packaged and clearly some expertise in using the forklift was needed to complete the manoeuvre safely.

141 It was equally, if not more, possible that the damage was caused or considerable worsened by the driver and others working on the lorry to "repair" the damage particularly given tools, such as a crowbar were used. There was no evidence at all setting out what precisely the damage was that the claimant was alleged to have been responsible for.

142 The Tribunal did not hear evidence from the driver nor see what his (brief) statement said. Even if the statement was clear in suggesting the claimant was responsible, and even although there was another witness statement, provided some time after the event implicating the claimant, having heard the claimant's evidence the Tribunal finds that it was more likely than not that what he says happened. There was no evidence as to what damage the driver (or the colleague) said the claimant had occasioned and it was equally possible those individuals were mistaken, or were seeking to protect their own position. On the balance of probabilities the Tribunal finds the claimant was not in any way at fault in relation to this incident.

Law

153. This is a claim for unfair dismissal. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights

Act 1996 and whether it had a genuine belief in that reason. One of the potentially fair reasons is for matters relating to "conduct". Another is "some other substantial reason". The burden of proof here rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed the relevant misconduct (or that the reason was some other substantial reason) and that belief was the reason for dismissal.

154. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).

155. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

> "Depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and Shall be determined in accordance with equity and the substantial merits of the case."

156. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; ***Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden*** *2000 ICR 1283.* It should be recognised that different employers may reasonably react in different ways and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

157. Mr Justice Browne-Wilkinson in his judgement in ***Iceland Frozen Foods Ltd v Jones*** *ICR 17*, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

> "The starting out should always be the words of section 98(4) themselves
>
> In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair
>
> In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt
>
> In many (though not all) cases there is a band of reasonable responses to the employee's conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

158. In terms of procedural fairness, the (then) *House of Lords in* ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** *f*irmly establishes that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he

investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

159. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in **British Home Stores v Burchell** 1980 ICR 303 the employer must show:

a) It believed the employee guilty of misconduct

b) It had in mind reasonable grounds upon which to sustain that belief

c) At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity and the substantial merits of the case.

160. In ***Ilea v Gravett 1988 IRLR 487*** the Employment Appeal Tribunal considered the Burchill principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will

increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

161. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

162. The amount of investigation needed will vary from case to case. In ***Gray Dunn v Edwards*** *EAT/324/79* Lord McDonald stated that "it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal." In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded ***British Labour Pump v Byrne*** *1979 IRLR 94* principle but emphasises that the amount of investigation needed will vary in each case. Thus in ***RSPB v Croucher*** *1984 IRLR 425* the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

163. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. *In* ***Ulsterbus v Henderson*** *1989 IRLR 251* the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-

examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

164. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in **Fuller v Lloyds Bank** 1991 IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see **Sainsburys v Hitt** 2003 IRLR 23).

165. The Court in **Babapulle v Ealing** 2013 IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (**Strouthous v London Underground** 2004 IRLR 636).

166. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter and allowing an appeal.

167. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process *(**West Midland v Tipton** 1986 ICR 192*). This was confirmed in ***Taylor v OCS** 2006 IRLR 613* where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and

that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Opening up a previous final written warning

168. The leading authority in relation to how previously issued final written warnings should be dealt with is found in the comments of then President Langstaff in the **Wincanton -v- Stone** 2013 IRLR 178. At paragraph 37 the court emphasised that the Tribunal should take into account the fact that a final written warning has been issued, and in particular not go behind a warning to take into account factual circumstances giving rise to the warning except in limited circumstances. It is worth quoting that paragraph from the judgment in full: “We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:

i. The Tribunal should take into account the fact of that warning.

ii. A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning.

An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.

iii. It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

iv. It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

v. Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

vi. A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever

nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."

169. The law in this area was considered in **Davies v Sandwell MBC** 2013 E&W Civ 135 which we have considered and applied.

Compensation

170. Where a claimant has been unfairly dismissed compensation is awarded by way of a basic award (calculated as per section 119 of the Employment Rights act 1996) and a compensatory award, per section 123 of the Employment Rights Act 1996 ("the 1996 Act"), being such amount as is just and equitable so far as attributable to action taken by the employer.

Basic award

171. This is calculated in a similar way to a redundancy payment. The basic award is subject to reduction where the conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (section 122(2) Employment Rights Act 1996).

Compensatory award

172. This must reflect the losses sustained by the claimant as a result of the dismissal. In respect of this award it may be appropriate to make a deduction under the principle derived from the case of **Polkey**, if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in **Silifant v Powell** 1983 IRLR 91, and in ***Software 2000 Ltd v Andrews*** *2007 IRLR 568,* although the latter case was decided on the statutory dismissal procedures that were later repealed. The case of ***Ministry of Justice v Parry*** *2013 ICR 311* is relevant too. The Tribunal must consider all the circumstances in deciding whether it is able to assess the chance of a fair dismissal (see ***Frew v Springboig St John's School*** *UKEATS/0052/10*). Further, if an employer

wishes to advance a **Polkey** argument, it should be supported by evidence (***Compass v Ayodele*** *2011 IRLR 802*).

Mitigation

173. The leading authority in this area is ***Wilding v BT 2002 ICR 107.*** That case confirms that the onus is on a wrongdoer to show that the claimant failed to mitigate their loss by unreasonably refusing an offer of reemployment. It is not enough to show that it would have been reasonable for the employee to take those steps since it was necessary to show that it was unreasonable for the innocent party not to take them. It is only where the wrongdoer can show affirmatively that the innocent party has acted unreasonably in relation to the duty to mitigate that such a defence can succeed. This was considered in **Cooper v Lindsey** UKEAT/184/15 where Langstaff P noted that there is a difference between acting reasonably and not acting unreasonably. It is not for the claimant to show that what he did was reasonable. The central cause is the act of the wrongdoer.

174. Lady Wise considered this issue in ***Wright v Silverline UKEATS/8/16*** where she noted that the Employment Judge had erred in adopting a starting point of considering whether the employee's conduct was unreasonable and by failing to make it clear that the onus is on the wrongdoer to show that the employee failed to mitigate their loss. The onus is not neutral and it is for the respondent to show that the claimant acted unreasonably.

Reduction of the awards

175. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant but the tests are different.

176. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86***. In ***Nelson v BBC (No. 2) 1979 IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of

unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. The Employment Appeal Tribunal proposed contribution levels of 100% (employee wholly to blame), 75% (employee mainly to blame), 50% (employee and employer equally to blame) and 25% (employee slightly to blame). That was not, however, specifically endorsed by the Court of Appeal and there is no reason a Tribunal has to follow these guidelines as they are a matter of common sense. The more serious and obviously 'wrong' an employee's conduct, the higher the deduction is likely to be.

177. A Tribunal should also consider whether there is an overlap between the **Polkey** principle and the issue of contribution (**Lenlyn UK Ltd v Kular UKEAT/0108/16).**

178. Thus, if the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. There need be no causal connection between the dismissal and the conduct when a Tribunal considers a reduction to the basic award.

179. A deduction for contributory fault under s 123(6) can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal.

180. In ***Nelson v BBC (No 2)*** [1979] IRLR 346 the Court of Appeal said that three factors must be satisfied for the tribunal to find there to be contributory conduct. The first of these is that the conduct must be culpable or blameworthy. The second is that it must have caused or contributed to the dismissal. The third is that it must be just and equitable to reduce the award by the proportion specified.

181. In ***Steen v ASP Packaging Ltd*** [2014] ICR 56 the Employment Appeal Tribunal stated that the application of those sections to any question of

compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of section 123(6) of the Employment Rights Act 1996 if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. It will likely be an error of law if the Tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with these four matters. The court said that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning and of its nature a particular percentage or fraction by which to reduce compensation is not susceptible to precise calculation but the factors which held to establish a particular percentage should be, even briefly, identified.

182. In **Steen** a finding of 100% contributory conduct was said to be an unusual finding but a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable: see ***Lemonious v Church Commissioners*** UKEAT/0253/12.

183. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Submissions

184. Both parties were given time to prepare written submissions and exchange them with each other. There was then the opportunity for oral submissions to supplement any submission or to deal with any issue from the other party's submissions. The Tribunal sets out they key submissions in relation to each issue below before reaching its conclusion. The following is only a summary of the submissions, all of which were fully taken into account by the Tribunal in its deliberations. The Tribunal now turns to each of the issues arising.

Reason for dismissal

185. The set of beliefs that caused the respondent to dismiss the claimant was the respondent's belief that the claimant had negligently caused damage to property. Both Mr Hastings and Mr Egan concluded that the claimant had been responsible for the damage and that was why they decided to dismiss (given their belief he had been responsible for previous damage that had led to a final written warning being applied). The reason for the claimant's dismissal therefore related to conduct and was a potentially fair reason.

Genuine belief?

186. The respondent's agent argued that the belief was genuinely held. The claimant's agent argued that the respondent did not have a genuine belief in the claimant's guilt. This was because it was asserted that the respondent, through Mr Struthers and Mr Shevlin, orchestrated a disciplinary case against the claimant for the purpose of getting him dismissed, having failed to do so previously and in retaliation for his ongoing grievance and prior successful appeal (which involved significant criticism including substantial criticism of Mr Shevlin in particular).

187. The claimant's agent argued that the lack of impartiality was apparent throughout the process as Mr Shevlin was clearly a wholly inappropriate person to conduct any disciplinary investigation in relation to the claimant in light of his grievance.

Decision on genuineness of belief

191. At the point of the claimant's appeal against his dismissal, which is when the assessment should be made, Mr Egan genuinely believed that the claimant had been responsible for the actions that led to the final written warning and the warning. Mr Egan decided not to look behind the final written warning and accept it at face value. This is dealt with below. He believed that the claimant was responsible for the damage in question. He genuinely believed in the claimant's guilt. The matters relied upon by the claimant's agent did not result in Mr Egan not genuinely believing in the claimants guilt but they are relevant as to whether or not there were reasonable grounds to sustain the belief. The belief in the claimant's guilt was genuine.

Did the respondent have reasonable grounds on which to sustain its belief?

192. While Mr Egan genuinely believed in the claimant's guilt, that belief, was not based on reasonable grounds. There are a number of reasons for the Tribunal's decision in this regard.

193. Firstly, as Mr Gill said in evidence, he had concluded that he could not rule out the possibility that the damage was caused by the claimant. He was unable to say whether or not he concluded the claimant was responsible given the evidence before him. He accepted it was very difficult to conclude a forklift had caused the damage. Mr Egan believed that it had but his conclusion was that a forklift could have caused the damage. He required to have reasonable grounds for believing that it was the claimant's operation of the forklift that caused the damage. From the evidence before him there were no reasonable grounds to sustain the belief in the claimant's guilt. The context is key in that regard. The absence of any evidence showing what specific damage the claimant is said to have caused is vital. While Mr Egan disputed the position, there was no evidence as a matter of fact showing what the claimant was alleged to have done.

194. The photographs showed the position after another operator had used a forklift to do the same operation the claimant had and after the driver and

others had used tools including a crow bar on the vehicle. Mr Egan had no reasonable basis for concluding the claimant was responsible for that damage. While he accepted what the driver's statement had said which was supported by another witness statement, the context of this case supports the claimant's assertion that more was needed before it could reasonably be said that the claimant was the person who had caused damage. Given Mr Egan conceded that Mr Shevlin was not an appropriate person to have investigated the issues, it was not reasonable to rely solely upon what Mr Egan produced from the driver and colleague.

195. From the evidence before the respondent it could not be said that the claimant was responsible for the damage, looking at matters objectively. While the driver said it was the claimant, the claimant denied this. The Tribunal did not have the statements that were taken during the disciplinary process. It is clear that the driver alleged the claimant was responsible but he only said it was the claimant when Mr Shevlin asked him. Mr Gill was concerned that the statement taken from the driver was very brief and he would have liked more information. He also accepted given the facts (the fact he had not been told the correct information about the CCTV and given the issues the claimant had raised about Mr Shevlin) he would have looked at matters "in more detail". Mr Egan said he had been told by Mr Struthers that the CCTV was broken despite the fact the investigation report made it clear that the CCTV had been viewed. The investigation that led to the belief in the claimant's guilt was unreasonable.

196. In addition to the driver's statement, the details of which were not seen by the Tribunal, other than the driver blaming the claimant, the only other evidence supporting the claimant being responsible was that of Mr Miller. He did not report anything at the time and gave a statement several hours later to Mr Shevlin claiming to have witnessed the claimant causing damage from a distance and shouted to tell him. Mr Miller had previously raised concerns about Mr Shevlin and had given inconsistent accounts as to how and why he made that statement, indicating at one stage that he had been coerced into doing so. Mr Miller was also leaving the respondent's employment at the time.

Neither Mr Miller nor the driver reported any issue at that time. The context of both statements did not provide a reasonable basis for concluding the claimant was responsible given the facts of this case. No reasonable employer would have relied exclusively on such statements to believe in the claimant's guilt given the surrounding facts in this case.

197. The evidence that was before the dismissing and appeal officer has been taken not only after the claimant had worked on the vehicle but after another, less qualified, operative had worked on the vehicle and attempts were made, with a crowbar and other implements, to repair the damage. Simply relying on what the driver said, who was potentially liable for the damage, along with another witness, did not provide a reasonable basis for the belief, given the context.

198. It could not reasonably have been possible to discern from the photographs what damage, if any, was caused by the claimant. There was never any account taken from the driver as to what damage he alleged the claimant to have caused and why he allowed the operation of unloading to continue and why he did not report the damage to the claimant immediately.

199. Given the decision was that the forklift had caused the damage, there was no attempt to find out which of the forklift operators had been responsible, given the claimant and another less qualified operative had worked on the area that was damaged, with the damage being raised after the other operative had completed his operation. There was no consideration given to the fact that the other operative may in fact have been responsible. Given the context of this case, that failure resulted in there being no reasonable basis to conclude it was the claimant.

200. It was also not clear how the damage could have been caused by the forklift given the nature of the damage – particularly to the apex. There was no reasonable basis to conclude the claimant was guilty.

201. The other possibility was that some of the damage had been pre-existing when the lorry arrived or just before the claimant commenced the operation.

There was no evidence as the position of the lorry or its state at that stage. It was clearly possible that there was some pre-existing damage which had made the curtain difficult to manoeuvre and in attempting to 'fix' that issue, after unloading, the driver (or others who assisted) made it worse. The driver had been working alone on the lorry for an unknown period of time before he was spotted and questioned and did not report any issue prior to this. That does not provide a reasonable basis for believing the driver that the claimant was responsible.

202. Simply assuming that it was not likely the driver would have driven with the curtain open ignores the possibility that the damage was caused very shortly before the unloading or that the pre-existing damage made the curtain difficult but not impossible to manoeuvre and the driver (or others) made it worse.

203. The final reason why there was no reasonable basis for concluding in the claimant's guilt was because of the position in relation to the CCTV. The area where the damage happened was covered by CCTV and the claimant immediately and thereafter asked for this. It was unlikely the claimant would be so keen to ask for CCTV if he had been responsible for any damage. The inconsistency in the position with regard to the CCTV was significant.

204. The claimant's agent was correct to say that Mr Gill conceded in evidence that he could not determine whether or not the claimant had caused any damage to the lorry. At most he could not rule out the possibility that he had done so. He accepted that if CCTV existed (which it did) he would have wanted to review it before making a decision and if he had been able to make further enquiries in relation to the driver before making a decision. No further inquiries were made to ascertain the position about this crucial evidence.

205. Mr Gill accepted that had he known that Mr Struthers had been involved in the investigation this would have been significant and that, had he had the full picture in relation to Mr Shevlin and Mr Struthers involvement, in the context of the claimant's prior grievance and disciplinary that may have affected his view. These issues underline why there was no reasonable basis to accept what the driver and Mr Miller said.

206. It was not reasonable on the facts of this case for Mr Gill (and Mr Egan) to rely on witness statements identifying the claimant as the wrongdoer and exclude the context. It was not correct to say that the respondent considered the claimant's arguments and discounted them on reasonable grounds given the points above. In order for there to be reasonable grounds to believe in the claimant's guilt a reasonable basis is required. For the above reasons there was no reasonable basis to believe in the claimant's guilt.

207. In short the respondent did not have a reasonable basis in light of the evidence before it at the time to conclude that the claimant was responsible for the damage in question.

Had the respondent carried out as much investigation as was reasonable?

208. The respondent's agent argued thar the key witnesses were spoken to by the investigating manager. Those witnesses identified the claimant as having caused the damage to the vehicle. Photographs were taken shortly after the damage was reported. Enquiries were made into the availability of CCTV and it was recorded that there was no CCTV footage of the incident due to sun glare. It is submitted that the scope of the investigation fell within the range of reasonable responses.

209. The claimant's agent argued that the investigation was wholly unfair. Mr Gill and Mr Egan both accepted this in cross examination (in relation to the failure to provide CCTV and the involvement of Mr Shevlin respectively). The investigation was unfair in that:

a. Mr Shevlin was not impartial and it was unfair for him to conduct it. He was the subject of an ongoing grievance for bullying and unfair treatment brought by the claimant had had previously retaliated against the claimant by instigating unfair disciplinary proceedings against the claimant, during which the claimant had specifically highlighted that he had an ongoing grievance against his manager

but was not allowed to air that issue because the appeal was upheld on procedural grounds after an early adjournment;

b. CCTV of the incident was deliberately withheld from the claimant by Mr Struthers and Mr Shevlin despite immediate and repeated requests by the claimant to view it;

c. A photograph which showed damage that was not consistent with being caused by a forklift was removed and withheld from the claimant between the investigation meeting and the disciplinary meeting;

d. The involvement of Mr Struthers in the investigation (viewing the CCTV footage) was concealed from the claimant and Mr Struthers should not have been involved in the investigation at all;

e. The lorry driver and other workers were allowed to attempt to 'repair' the lorry using tools and causing damage after it was alleged that the claimant had caused damage and before photographs were taken;

f. There was a failure to investigate other potential causes of the damage, namely pre-existing damage and attempted repairs by the driver (or others), or damage being caused by Mr McBride.

Decision as to reasonable investigation

220. It is important in assessing whether or not an employer carries out as much investigation as is reasonable to recognise that different, equally reasonable, employers may act differently. It is also important for the Tribunal to avoid substituting what it would have done and apply the statutory wording in deciding whether or not the respondent acted fairly and reasonably on the facts.

221. In this case the Tribunal finds that the respondent did not carry out a reasonable investigation that led to its belief in the claimant's guilt.

222. While the respondent's agent correctly notes that on the face of it an investigation took place, the matter was considered and a decision reached, when viewed fairly as against the evidence and context, the investigation in this case from the material before the respondent at the time was materially unfair and unreasonable. It fell far short of what a reasonable employer would to in order to fairly sustain a belief in guilt based upon a reasonable investigation. There are a number of reasons for this.

223. Firstly the Tribunal finds that it was unreasonable to have a person against whom grievances had been raised conduct the investigation. This was particularly so where there were other managers on site who could have considered matters. Mr Shevlin was the subject of an ongoing grievance for bullying and unfair treatment brought by the claimant had had previously had material involvement in disciplinary proceedings against the claimant, during which the claimant had specifically highlighted that he had an ongoing grievance against his manager but was not allowed to air that issue because the appeal was upheld on procedural grounds after an early adjournment. This was a point that Mr Egan accepted in cross examination. He believed that given the facts of the case, as he now knows them to be, it was not appropriate for Mr Shevlin to have been the investigator in this case. He also conceded that he did not consider this point in his appeal (despite the claimant having raised it as an issue).

224. Even if the grievance raised by the claimant had no merit, it was placing too much responsibility on Mr Shevlin to ask that he investigate the claimant fairly. Given the existence of other managers on site, against whom the claimant had no issue, a reasonable employer would have ensured that a fair and reasonable investigation be carried out by someone who had no such involvement with the claimant. Natural justice requires there to be fairness in terms of an investigation. It was clear that the claimant had real concerns about Mr Shevlin, who had previously investigated matters in a fashion that led to the outcome being overturned (due to the inadequacy in the investigation). Given the suspicion the claimant had as to Mr Shevlin's

approach, a reasonable employer, particularly in light of the size and resources of the respondent, would have asked a colleague with no prior involvement to investigate. There were such colleagues available at the site the claimant worked and no explanation was given for such a person not being asked to progress matters.

225. Secondly, a reasonable investigation would have properly considered the CCTV position and provided this to the claimant. This evidence had the potential to show precisely how the damage happened. A reasonable investigation would focus on that given the context and disputes (which would have been entirely resolved by checking the CCTV and involving the claimant). The fact the person who had in fact viewed the material, Mr Struthers, had not been disclosed was unreasonable. A reasonable investigation would have fully ascertained the position with regard to the CCTV – involving both viewing it and speaking to those who had seen it. Given Mr Struthers was an individual against whom the claimant had raised a grievance, it was not reasonable to rely upon what he said without more enquiry. Mr Gill was concerned about his involvement, about which he was unaware. Further concerns arise in this regard given Mr Egan was told by Mr Struthers that the CCTV was broken. It was not and there was no reason given as to why this was stated.

226. The Tribunal considered that the absence of a photograph which showed damage that was not consistent with being caused by a forklift was relevant but not a material matter in assessing the reasonableness of the investigation.

227. Thirdly, one of the major failings of the investigation was that the investigation focussed upon seeking evidence of the claimant's guilt rather than fairly looking for evidence that explained how the damage was occasioned. It was clear that the report Mr Shevlin provided included information showing why the claimant may have been responsible instead of fairly looking to identify what the cause may in fact have been. There were at least 3 other potential causes of the damage – the damage was pre-existing when the lorry arrived

in some way, Mr McBride had caused damage when completing the same operation the claimant did (on the same forklift, without being qualified to operate the forklift) or the damage was caused by the driver and other staff using tools, including a crowbar, to the area in question. The report did not mention the concerns over the CCTV. No mention was made of the fact it was Mr Struthers who told Mr Shevlin about the CCTV (and it had not been viewed by him). The investigation had focussed on the statements suggesting the claimant was responsible without fully checking whether those statements (one of which, the drivers, was "brief") were accurate or stood up to scrutiny.

228. Fourthly, in this case the lorry driver and other workers were allowed to work on the damage using tools after it was alleged that the claimant had caused damage and before photographs were taken. That created unfairness because it was possible that even if the claimant had caused some damage it could have been so minor to be de minimis but the subsequent work resulted in the damage which was subsequently relied upon. No reasonable employer would have allowed that to have happened as part of an investigation.

229. The failure to consider other possible causes of the damage and properly investigate that was also a serious failing in the investigation. No reasonable employer at the investigation stage would failed to consider properly other causes of damage, whether by checking the CCTV as to the lorry entering the yard, to following up with the lorry driver the points made by the claimant (and asking why the matter was not raised until after others had worked on the vehicle) to taking a statement from the other operator who was less qualified to work on a forklift than the claimant. It was unreasonable to focus solely on the claimant as the author of the damage in question.

230. Taking a step back, the Tribunal finds that the investigation that took place in this case was unreasonable. No reasonable employer would have investigated the matter in the way the respondent did. The failure to properly and fairly investigate the matter rendered the decision to dismiss unfair.

Procedural fairness

232. The respondent's agent argued that there was no evidence to suggest that Mr Shevlin was not impartial in conducting the investigation. Mr Shevlin confirmed in evidence that he perceived his relationship with the claimant as being "*alright*" and understood the claimant's grievance to have been about training and overtime opportunities. Mr Shevlin was asked to carry out the investigation because he happened to be the manager available at the time. Mr Shevlin took reasonable steps to investigate the allegation. Mr Shevlin confirmed in evidence that he updated and followed the advice of the respondent's HR service throughout his investigation. There has been no suggestion that the respondent's HR service was biased against the claimant. It is submitted that a different investigating manager from within the respondent's business would have carried out the same steps and would have reached the same conclusions as Mr Shevlin.

233. The respondent's agent submitted that a witness statement was obtained from Mr Struthers as part of the appeal process. The Tribunal must take account of the whole process, including the effect of the appeal. In any event, the witness statement had no bearing on the outcome. Mr Shevlin refuted that a photograph was withheld from the claimant. Mr Shevlin said he uploaded all documentation he had.

234. With regards to the CCTV footage, it was accepted that this was not provided to the claimant. Mr Shevlin duly enquired with his superior about its availability and was advised that the footage available did not show the incident due to sun glare. Mr Shevlin recorded this in his investigation report. It was submitted that it was reasonable for Mr Shevlin to accept the word of a superior colleague on this matter; he did not 'withhold' CCTV as alleged.

235. It was also accepted that attempts were made to repair the vehicle by the time photographs were taken but the photographs were viewed by Mr Gill with this knowledge. He acknowledged in evidence that he attached greater weight to the other parts of the evidence. It was argued that the delay between the damage occurring and photographs being taken did not render the

investigation unfair. The outcome would not have been different had the photographs been taken earlier.

236. It was also argued by the respondent's agent that Mr Egan looked at the examples given by the claimant but they were too old to be properly comparable since they were when another management team was in place. He did consider the material and included a response in his outcome letter. The evidence was of no use.

237. The respondent's agent argued that the process followed was fair in all other respects. Each manager involved was largely guided by HR throughout the process. Even if the procedure was flawed, those flaws had no bearing on the outcome and the process followed was fair.

238. The claimant's agent relied upon the unfair investigation above as demonstrating the unfair procedure. In addition it was submitted that the dismissal was also procedurally unfair in that:

a. There was a total failure to consider the claimant's argument in relation to inconsistency of treatment by Mr Gill and this was not cured by Mr Egan on appeal. While he accepted information from the claimant, he dismissed it without providing any evidence of any investigations he carried out and on a false basis. It was entirely possible for the respondent to make its own enquires in relation to accident and damage reports and sample test to see whether disciplinary action followed or not.

b. There was a total failure to consider any sanction short of dismissal by both Mr Gill and Mr Egan, contrary to the respondent's own policy.

239. The claimant's agent also argued that each of the acts relied upon throughout this process were minor accidents involving little, if any, damage. They were all similar in nature and did not meet the threshold to entitle disciplinary action to be taken. That was important evidence and showed how the claimant was treated differently compared to Mr McBride treated. Given the damage could have been caused by Mr McBride and Mr McBride was not qualified, it was

instructive that no action nor investigation was taken in relation to him and this incident.

Decision on procedural position

240. As indicated above, having considered the evidence before the respondent at the time, the Tribunal finds that the respondent failed to carry out reasonable investigation. Issues as to procedure are closely linked to this. The submissions made by the claimant's agent with regard to the procedural unfairness have merit.

241. The failure to provide the claimant with a response to the evidence he presented was important. The claimant's position was that he was being subjected to an investigation in relation to matters which would normally not result in any sanction. His position was that at worst the matter would have been raised verbally with no formal action being taken. He presented information which he said supported that position. The respondent failed to properly engage with that position. While Mr Egan said he did consider the matter, the claimant was provided with no response that would have allowed any errors in what Mr Egan had been told to be corrected. The claimant said he knew personally of some of the incidents that had occurred and that they were similar and recent to his incident. By failing to provide the outcome of his research to the claimant, the claimant was prevented from being able to show why he was being treated differently. That was unfair. Mr Egan noted that "many" of the incidents provided by the claimant were comparable but failed to explain which were or why he did not accept the claimant's position.

242. That failure went to the substance of the fairness given the claimant was arguing he was being treated differently to other staff. The context of this case supports his perception and a reasonable employer would have considered the specifics given to them. The fact Mr Egan accepted, in retrospect, that it was not appropriate for Mr Shevlin to have been the investigating officer, supports this contention. It was not sufficient to rely upon internal advice given that the facts were different given the issues in this case.

243. Both the dismissing and appeal officers were clear in that they understood they had no discretion in terms of outcome. Nevertheless both indicated that had they considered matters the outcome would have been the same. That was not therefore a material failing and was not one which would have altered the outcome of this case.

244. With regard to the points made by the respondent's agent, while it appeared that Mr Shevlin was impartial in conducting the investigation as set out above his focus appeared to be upon factors that supported guilt of the claimant rather than properly investigating the cause and leaving the likely cause to the disciplinary process. The Tribunal did not consider that there was any evidential basis to find that a different investigating manager would have carried out the same steps and would have reached the same conclusions as Mr Shevlin. Given the very significant challenges to the investigation process and issues arising, combined with the context between Mr Shevlin and the claimant, that was an unlikely outcome.

245. The respondent's submission that the matter should be considered from the perspective at the appeal process is correct. The statement from Mr Struthers was not provided to the claimant but it is correct to say that the witness statement had no bearing on the outcome but the claimant had a perception that Mr Struthers was not acting fairly towards him and was somehow involved in the disciplinary process, despite there being nothing on the face of it showing his involvement. Despite that Mr Struthers did instruct Mr Shevlin as to the CCTV and told Mr Egan there was no footage. With regards to the CCTV footage, the Tribunal does not accept that Ms Shevlin acted reasonably. A reasonable employer would ensure the footage was viewed personally before accepting what a superior said, particularly where it is known that the employee believed that particular manager was not likely to be fair towards him. A reasonable investigation would have ensured the CCTV was viewed in those circumstances.

246. With regard to the a photograph, Mr Shevlin said he had uploaded all of the photographs for the disciplinary process but it was clear that the photograph

in question was not before the disciplinary panel, for whatever reason. This was the photograph the claimant and his colleague said showed that it was highly unlikely that the damage was caused by a forklift.

247. The Tribunal does not accept the submission that the outcome would not have been different had the photographs been taken sooner. There is no evidence to uphold that submission. The absence of any evidence as to what damage had been occasioned by the claimant was a fundamental failure since there was no nothing to show what the claimant was alleged to have done, rather than what someone else could have done. It was unclear what damage the respondent concluded the claimant had done given the absence of evidence and the involvement of third parties. It was possible, for example, the claimant had caused very minor damage which was seen by the driver and a colleague which was very significantly worsened by the subsequent events. No steps were taken to ascertain what the amount of damage the claimant caused were. The fact the driver's statement was "very brief" underlined this failure.

248. It was also argued by the respondent's agent that Mr Egan looked at the examples given by the claimant but they were too old to be properly comparable since they were when another management team was in place. He did consider the material and included a response in his outcome letter. The difficulty was that Mr Egan did not provide the claimant with the reason why he found this, given the claimant was clear that he knew those responsible and the incidents were similar to that in this case and recent. Given the claimant argued he was being treated differently and the approach the respondent took was normally to "have a word" with workers who cause such damage, it was important to consider this point fairly.

249. The procedure that was followed with regard to the dismissal was unfair for the reasons set out above.

Did the decision to dismiss fall within the range of reasonable responses?

250. The respondent's agent submitted that Mr Gill considered the claimant's conduct to be negligent and decided that the appropriate sanction for the misconduct was a written warning. At the time of the disciplinary hearing the claimant had a live final written warning on his file. Accordingly, Mr Gill decided to dismiss the claimant. The disciplinary policy permits dismissal in such circumstances and that is what Mr Gill did. Given the pattern of negligence and consequences of the actions the decision to dismiss fell within the range of reasonable responses open to the respondent.

255. The claimant's agent argued that if the Tribunal is entitled to 'go behind' the final written warning then it was agreed (with the respondent's agent) that the dismissal must be found to be unfair. In the alternative it was submitted that the dismissal is unfair both procedurally and substantively. The claimant's history in relation Mr Shevlin and his managers that lead to the unfair disciplinary process and 2019 dismissal is highly relevant background information. It was argued that the claimant was unfairly targeted by Mr Shevlin and Mr Struthers and subjected, for a second time, to a wholly unfair disciplinary process and dismissal in circumstances where any other operative would not have been subjected to any disciplinary process at all. No reasonable employer would dismiss an employee in these circumstances.

256. In order to determine this issue it is necessary to assess whether or not the final written warning is something that the respondent was entitled to take into account given the dismissal and appeal officers both would not have dismissed the claimant had there been no such warning.

Was the final written warning manifestly inappropriate?

258. The respondent's agent argued that the claimant was issued with a final written warning in February 2019 as a result of an incident which took place on 7 December 2018. There is no basis on which it could be concluded that the decision to issue a final written warning was manifestly inappropriate.

259. The claimant's agent submitted that it was common ground that where there is no prior disciplinary record (as was the case here) a final written warning

will only be an available sanction in response to a finding of gross misconduct which could justify summary dismissal.

260. In this case the final written warning was not issued in a straightforward way. The claimant was initially unfairly dismissed when his supervisor and higher-level manager, against whom he had very recently raised a formal grievance, instigated a disciplinary procedure which the claimant alleges was brought in bad faith and retaliation against him

261. Mr Hastings imposed the final written warning on the basis of a single incident, the 7 December 2018 incident where the claimant overcorrected his steering and reported minor damage to a vehicle. The initial disciplinary invite and dismissal was very clearly on the basis that the cumulative effect of the 4 allegations formed the basis of the allegation of gross misconduct. Part of the claimant's appeal took issue with this categorisation. It was never suggested to the claimant that the 4th incident was more severe or different to the others and in evidence Mr Shevlin confirmed he considered they were all of the same level of seriousness.

262. The claimant's agent argued that the facts of the incident that led to the final written warning could only ever have be known by the disciplining officer based on the claimant's account since no other evidence was taken or relied upon. It is the claimant's evidence that must be considered in assessing the outcome. The claimant reported the damage and there is a contemporaneous report of this.

263. It was submitted that this was an minor error. It involved an overcorrection of steering. The claimant could see where he was going but misjudged the correction. There was no risk of injury. It was argued that the suggestion by Mr Hastings that the claimant could not see was not based on the evidence at the time. It was never suggested and there was simply no evidence to support that assertion. The claimant was driving a very heavy vehicle which took time to turn and stop and he was operating it within a very tight space. The claimant clearly denied ever not being able to see. It was negligence at

most which would at the very worst justify a written warning. It was not serious negligence and could in no sense justify a final written warning. It was also not something by itself which the respondent viewed as potentially gross misconduct. There is nothing in any of the contemporaneous document that show the respondent thought it did. The invite letter was on the basis of the cumulative effect of all 4 events and not one single event. For that reason the warning was manifestly inappropriate

264. In short the act was not substantially different in character to any other instances of accidental damage in which the claimant was involved. The respondent's own approach showed this since it was argued that the 4 individual incidents were minor in nature. The claimant did not accept any sanction was fair for each of them but it shows that there was no substantive difference in terms of their nature. They were all minor incidents.

265. The claimant was never told he was facing a gross misconduct allegation in relation to the 4th incident alone, and had no opportunity to dispute the severity of the charge or sanction before it was imposed. He was not allowed any appeal against it despite being told that he would.

266. Mr Hastings acknowledged that the dismissal could not stand because the process had been unfair, but failed to consider the claimant's case as to why this had happened i.e. that the case was brought against him in retaliation for his grievance. It is plainly clear from the fact that no action whatsoever was taken in relation to the 3 prior incidents which Mr Shevlin considered to be of the same level of severity as the 4th that the disciplinary action was not brought in good faith and, that were it not for the claimant's grievance, no action would have been taken in relation to the 4th incident.

267. The final written warning was not issued in good faith and there was no prima facie basis for imposing it, as the conduct clearly was not capable of being viewed as gross misconduct. It was therefore manifestly inappropriate and the Tribunal is entitled to go behind it when considering the issue of fairness.

Decision on whether the final written warning was manifestly inappropriate

268. Applying the authorities in this area, the circumstances of a final written warning fall to be considered as part of the issue of the fairness of the dismissal. It is only in very limited circumstances that a Tribunal may 'go behind' the final written warning to question whether it was fairly imposed, namely where it is found that it was manifestly inappropriate. In assessing this the Tribunal should consider whether the final written warning was issued in good faith, whether there were *prima facie* grounds for following the final warning procedure and ultimately whether it was manifestly inappropriate to issue the warning.

269. The action in respect of which a warning was issued was clearly solely the fourth incident to which the original disciplinary proceedings related (in respect of which the claimant had originally been dismissed). The outcome letter to the appeal suggested there should have been a sanction against the claimant for at least the second and third incident albeit the letter notes that witness statements should have been taken to allow the claimant to comment upon the incidents. Had the claimant been given the opportunity to comment upon the incidents it is entirely possible that no action may have been taken or minimal action may have followed. The letter notes that the respondent failed to properly investigate the incidents. The letter stated that "due to the serious nature of the fourth incident I have decided that you should receive a final written warning".

270. The incident that led to the final written warning happened on 7 December 2018 when the claimant overcorrected his steering and reported minor damage to a vehicle. As he was reversing in a tight space he felt he was too close to the kerb and corrected by turning left but when he went to straighten up his left hand side scraped the stairwell of a gritter.

271. The invite to the disciplinary hearing stated that there were 4 occasions giving rise to the action and that "the allegation(s) could be deemed as constitution gross misconduct. If the allegation(s) are proven at the hearing, [the claimant] may be summarily dismissed."

272. The dismissal letter stated that he was dismissed on grounds of gross misconduct but did not individually categorise each incident.

273. The facts underpinning the incident that led to the final written warning upon which the sanction was based were exclusively the facts from the claimant's account.

274. Mr Hasting accepted that during the appeal hearing there was no discussion with the claimant about the 4th incident in terms of any mitigation. He accepted that he made his decision without giving the claimant any chance to address him or raise any issue as to the incident itself or the severity of sanction despite the claimant disputing the level of damage that was alleged to have been caused. He accepted he reached a decision with regard to the sanction without hearing the claimant's response and in particular he accepted he based his decision on what he thought the damage had been. He accepted that the claimant was in fact of the view that the damage that had been caused was minor and significantly different to what Mr Hastings believed.

275. That was a very significant admission since the decision to apply the final written warning was based largely upon Mr Hastings' view of the damage rather than upon a decision reached after fairly investigating what the actual damage was. He believed as this was a larger vehicle there could have been more damage but he did not consider what the specific damage was, nor the claimant's explanation for it.

276. He also believed that this was more than an error of judgement by the claimant but because the claimant "kept doing it". He took the previous incidents into account, despite on his own admission, he had decided to reverse the decision to dismiss because the investigation into those 3 incidents had not been fair. While the claimant accepted damage had been done, he had an explanation for the damage. It is entirely possible that had a proper investigation been carried out, as Mr Hastings noted should have been done, his view as to the claimant's position would have been different. By not having the full facts at his disposal it was not fair to conclude that the claimant was

more at fault in terms of the fourth incident such as to justify a final written warning.

277. In evidence Mr Hastings said for him one of the reasons why a final written warning was justified was because the claimant had not seen where he was going. However, that was his evidence from memory rather than from the specific information before him at the time. There had been no suggestion at the time of the incident that the claimant had not seen where he was going. His position was consistently that he over corrected the error and could not stop the vehicle in time. The damage was minor, scratching the vehicle, which he reported immediately.

278. Mr Hastings did not have the full facts before him to assess whether or not the claimant had failed to see. Had he given the claimant the chance to explain his position, that the damage viewed by Mr Hastings was greater than the damage he caused, his view as to the seriousness would in all probabilities have been different. The claimant's contemporaneous note stated the gritter stairwell had been "scraped" and he was driving no more than 2mph. It was no fair to assume since there was contact the incident must therefore give rise to a finding of gross misconduct.

279. The disciplinary policy defines gross misconduct as including deliberate or malicious damage, fraud, dishonesty or corruption or serious negligence which causes unacceptable loss, damage or injury. Mr Hastings initially said that the claimant had been negligent. He had been but that is different from serious negligence. The conduct in question when properly viewed did not amount to conduct which could fall within the respondent's definition of gross misconduct.

280. The conduct in question was negligent – it was not serious negligence. There was no evidence any "unacceptable loss damage or injury". The damage in question was minor. Mr Hastings did not properly examine the nature of the damage.

281. The difficulty in this case was that the appeal hearing focussed on dismissal and the totality of each of the incidents. When Mr Hastings decided that he would reinstate the claimant, he did not return to discuss the penalty or seek the claimant's comments in relation to the 4th incident. Instead he concluded that a final written warning, being less than dismissal, was appropriate.

282. Having analysed the evidence before him carefully, the error of the claimant was a minor error. It involved an overcorrection of steering. There was no information that fairly suggested the claimant was seriously negligent causing unacceptable loss injury damage or injury or that he could not see where he was going. He misjudged the correction of the manoeuvre.

283. The Tribunal does not accept the claimant's agent's submissions that there was no risk of injury since the vehicle did make contact with the other vehicle but the damage noted by the claimant was minor. There was a possibility of injury since if someone had been present and if the claimant had not seen the person there was a risk of injury. That must follow from the claimant's position that he was overcorrecting his steering and that the vehicle was not easy to manoeuvre. If he did not see the overcorrection was leading to contact with another vehicle (such that he was able to stop it in time to avoid contact) he would similarly have been unable to stop it if there happened to be someone at that point where contact was made. The claimant was driving a very heavy vehicle which took time to turn and stop and he was operating it within a very tight space. The claimant made a mistake. He was negligent but not seriously negligent and the difference is important.

284. Given the sanction was only in respect of this incident, and not the previous incidents, the issue is whether Mr Hastings properly concluded that the claimant was guilty of serious negligence rather than negligence. It was unfortunate that Mr Hastings did not properly give the claimant the opportunity to discuss the incident in detail, particularly around whether or not he was able to see contact being made and whether or not the damage that had been occasioned was all caused by the claimant. The claimant believed that the

damage had been magnified since the damage Mr Hastings took into account was worse than the damage the claimant had reported on his accident sheet.

285. This was an act of negligence by the claimant. There were sufficient unanswered questions as to the nature of the damage and incident in question to prevent a fair characterisation of the incident to be serious negligence. The act for the fourth incident was not substantially different in character to the 3 other instances of accidental damage that had given rise to the proceedings. They were all minor incidents.

286. The fact Mr Gill accepted the nature of the incident in this situation was not materially different to the incident he considered is illustrative only. The respondent's agent was correct so say that one manager's view is not binding but it does highlight the way in which these matters are viewed by the respondent with all the facts available.

287. It is likely that had Mr Hastings considered the claimant's position and discussed the fourth incident fully with him, he would have investigated the claimant's assertion that he believed his managers were seeking to have him dismissed. At the very least he would have carefully considered the context in which the incident occurred and the seriousness of it, as against the backdrop in which the claimant worked. The earlier incidents had not been raised as a disciplinary issue. The claimant's position was that such incidents would ordinarily not give rise to any disciplinary sanctions. It was only after the claimant lodged his grievance that the respondent decided to investigate the matters (including the 3 previous incidents) as disciplinary matters. In other words it was possible that the disciplinary action was not raised in good faith. Because the focus was on avoiding dismissal, Mr Hastings overlooked the necessity to discuss the specific incident on which the sanction was based and its severity and the claimant's position. He focussed instead on what he believed the damage was and his belief as to risk without hearing what the claimant's view was on this and fairly taking that into account before deciding upon the outcome. That was conceded by Mr Hastings in cross examination.

288. While Mr Hastings issued the final written warning in good faith, in the sense that he believed the vehicle had been damaged and risk had been created from the information he had from the respondent, there was no prima facie basis for issuing a final written warning (on the information the claimant had). At its highest, from the information before the respondent the claimant had been guilty of negligence. There was no reasonable basis to conclude the claimant was guilty of serious negligence.

289. Mr Hastings suggested in cross examination that he had taken into account the earlier incidents in deciding that there had been repetition. That was unfair since the claimant had not been given the chance to explain why he had not done anything wrong in relation to those incidents (or that there was a policy of not penalising minor errors). In any event Mr Hastings stated elsewhere that the warning was only in relation to the fourth incident and that no action was taken in relation to the previous three incidents.

290. Mr Hasting also believed that there was a right of appeal from his decision which could in part have led him to focus on the fact that the claimant had not been dismissed, rather than upon the seriousness of a faunal written warning and of the need to ensure he properly took into account the claimant's position in respect of the incident to which the warning related. There was in fact no further appeal and Mr Hasting's decision was the final decision.

291. Looking at the conduct with the information before the respondent at the time, it was not reasonable to categorise the minor error the claimant made on this occasion as gross misconduct. The claimant made an error and damaged a wheel arch. He was negligent. The Tribunal has concluded that it was manifestly inappropriate to impose a final written warning. The claimant was negligent and no reasonable employer in light of the facts would have concluded that a fair outcome would be to characterise that as gross misconduct justifying a final written warning. It would have justified a written warning.

Band of reasonable responses

292. The parties had agreed that if the Tribunal concluded it was manifestly inappropriate to issue a final written warning, dismissing the claimant would be unfair. The Tribunal considers that the dismissal was unfair. The respondent required to act fairly and reasonably in all the circumstances in deciding to dismiss, taking account of size resources equity and the merits of this case. Applying the statutory language to the facts of this case and considering the submissions from both parties, the dismissal was unfair.

293. From the information before the respondent and assessing matters at the appeal stage, the claimant had been negligent and ought to have received a written warning in respect of the incident on 7 December 2018. The respondent did not act fairly and reasonably in concluding the claimant was guilty of further misconduct and in dismissing the claimant.

294. Even if the respondent had reasonably concluded that the claimant had been guilty of further misconduct justifying a written warning (which it was not) because of the incident on 2 October 2019, dismissal would still not have fallen within the range of responses open to a reasonable employer. Neither the dismissing officer nor appeal officer would have dismissed the claimant in that case for the conduct relied upon.

295. Even if the Tribunal was wrong with regard to its assessment of the final written warning, the decision to dismiss the claimant was a decision that no reasonable employer would have taken – even if there was an extant final written warning. It was a decision that fell outwith the range of responses open to a reasonable employer.

296. The claimant had made a mistake in December 2018 and was guilty of negligence. No reasonable employer would have concluded that there was a further act of misconduct in relation to the December 2019 incident. The respondent did not act fairly and reasonably in dismissing the claimant, whether he had a final written warning or first level warning.

297. The fairness of the decision is assessed by reference to size and resources of the respondent. The managers in this case took advice from their internal

HR support function. There were a number of errors with regard to the advice that was given. Ultimately, however the decision is judged by reference to the facts (irrespective of whose error it was). The respondent was a sizeable business with considerable HR support.

298. Equity required the respondent to act fairly. Natural justice should be followed. It was unfair to allow a persons against whom the claimant had raised serious complaints to conduct proceedings which could potentially lead to the claimant's dismissal. The claimant's livelihood was at risk and he had identified concerns as to the persons investigating the issue and the steps taken to investigate. Equity required the respondent to act fairly in investigating and ensure that the investigation looked at all reasonable explanations for the incident in question, and not just those that suggested the claimant was guilty. There was no evidence before the respondent identifying exactly what it was the claimant was alleged to have done given the intervening acts.

299. In assessing whether or not the dismissal fell within the range of responses open to a reasonable employer, the Tribunal recognised that different employers, all equally reasonable, can act in different ways. The question is whether, assessing matters at the appeal stage, the decision to dismiss on the facts fell within the range of responses open to a reasonable employer. The Tribunal can only take into account the matters before the respondent at the time (at the appeal stage). It was unreasonable to dismiss the claimant from the information before the respondent.

300. The Tribunal took into account the submission that Mr Gill had noted a pattern of negligence had been demonstrated by the claimant and that he considered the claimant's conduct posed a safety risk and, to protect other employees, his decision would have been to dismiss. Looking at the material before the respondent, the claimant had made minor errors. The level of damage that had been occasioned by the December incident had not been properly investigated and it was not fair to assume the information the respondent had was accurate, given the claimant had immediately reported the issue and

advised that there was minor damage. This was a minor error. The consequences of acts of negligence by workers operating large machinery could obviously be very serious in every case – not just the claimant's. However, from the information before the respondent there was no reasonable basis to assume the claimant presented a greater risk than any other worker. There was no basis reasonably to conclude that dismissal fell within the range of responses open to a reasonable employer.

301. Taking a step back and assessing matters objectively, the respondent did not act fairly and reasonably in dismissing the claimant, taking account of its size and resources, equity and the substantial merits of this case. The decision to dismiss the claimant in all the circumstances facing the respondent was a decision that fell outwith the range of responses open to a reasonable employer on the facts.

302. The claimant was therefore unfairly dismissed.

Remedy: *Polkey*

303. The respondent argued that if the dismissal was unfair due to the procedure followed, there should be a 100% reduction in compensation on the basis of the principle in *Polkey*. It was argued, for example, that anyone looking at the CCTV would have reached the same conclusion.

304. The claimant's agent argued that no reduction was appropriate because the dismissal was not only procedurally, but also substantively unfair. The effect of the procedural unfairness went far beyond anything capable of correction. If a fair investigation had been carried out, it would not have been conducted by Mr Shevlin and Mr Struthers would not have been involved. It is likely that no disciplinary investigation would have occurred at all, but if it did it is impossible to say that there is any realistic percentage chance that the claimant would have been fairly dismissed. Had the CCTV been made available, for example, the claimant says it would have wholly cleared him.

Decision on *Polkey*

305. The claimant's agent's submissions have merit. There was no evidence before the Tribunal to support the respondent's agent's submission that anyone viewing the CCTV would have reached the same decision or that anyone else conducting the investigation would have found the same facts. There was a strong possibility that the CCTV did in fact exculpate the claimant and that it had not been provided to him for that reason.

306. Equally, there is a strong possibility that had another independent manager been the investigator, disciplinary proceedings may not have been initiated since the investigator may have concluded that there was insufficient evidence to support the driver and colleague's view that the claimant was responsible or that in fact with proper investigation another more credible explanation for the damage may have been unveiled (such as the other less experienced operative or the driver being responsible or the damage having in the main been caused when others were seeking to repair it).

307. From the evidence before the Tribunal, there is no proper basis for speculating that the claimant would have been dismissed fairly at some point. Applying the principles within **Polkey**, the Tribunal declines to make any reduction. The Tribunal is not satisfied that had a fair procedure been followed the claimant would have been fairly dismissed at some point. There is no evidential basis to make such a reduction and it would not be just to do so.

Contribution

308. The respondent's agent argued that a reduction in compensation should be made to reflect the claimant's contributory fault. The claimant admitted to the conduct in December 2018 which gave rise to the final written warning. It is submitted that the claimant's conduct was grossly negligent. The respondent sought a reduction of 100% (to both the basic award and/or compensatory award), or such other amount as the Tribunal thinks fit. It was also argued that more generally it was just and equitable reduce compensation on contributory grounds since the claimant had admitted causing damage on previous occasions since 2018.

309. The claimant's agent argued that the claimant's account of what occurred on 2 October 2019 should be accepted and that he did not cause any damage to the lorry. It may well be that there was some pre-existing damage to the lorry/curtain made worse by the driver, or that some damage was caused by Mr McBride. It is clear that at least some of the damage the claimant was accused of causing could not have been caused by him using a forklift (the horizontal tear and the apex roof). In these circumstances no reduction for contributory fault is appropriate in relation to this incident.

310. The claimant's agent submitted that if the warning was found to be manifestly inappropriate, no reduction for contributory fault would be appropriate in relation to the 7 December 2018 incident because, had it not lead to a final written warning, this incident would not have led to dismissal at all. At most there would have been a 'talking to'.

311. It was argued that if the Tribunal did not find the warning to be manifestly inappropriate, then it is accepted that it did in fact contribute to his dismissal, as the respondent would not have dismissed the claimant in its absence. The circumstances of the 7 December incident were an overcorrection of steering causing a disputed and unspecified amount of damage. There was no risk of injury to any person. This was a straightforward example of driver error and is below the threshold of culpable or blameworthy conduct necessary for a finding of contributory fault.

312. The claimant's agent argued that it would not be correct in law to make a reduction for contributory fault based on first 3 incidents of damage in 2018 since no disciplinary sanction was imposed for those incidents and they did not therefore contribute to his dismissal. The respondent's agent accepted that was a fair assessment of the law.

Decision on contribution

313. The first step in considering contribution is to identify the conduct which is said to give rise to possible contributory fault. The respondent argued that the claimant had admitted to the conduct in December 2018 which gave rise to

the final warning in respect of which he was grossly negligent and a 100% reduction would be appropriate.

314. Having identified that conduct, the Tribunal must consider whether that conduct is blameworthy. From the facts found, the Tribunal was satisfied the claimant was not responsible for the damage. There was no culpable conduct in respect of this incident on the claimant's part.

315. Given there was no conduct of the claimant which could fairly be described as blameworthy in respect of that incident, that is not conduct which caused or contributed to his dismissal and that cannot give rise to a reduction in compensation.

316. The Tribunal then considered whether or not the conduct which the claimant admitted, namely the incident that occurred on 7 December 2018 was conduct in respect of which a reduction in compensation should be made. It applied the legal test with regard to this conduct.

317. The Tribunal must apply the legal test to the claimant's conduct which caused or contributed to the dismissal. His actions that led to the inappropriate final written warning plainly did contribute to his dismissal and must therefore be considered in light of the legal test for contribution. The Tribunal did not accept that no account should be taken of the conduct because had a fair approach been taken there would have been no dismissal. The conduct, for which the claimant accepted he was responsible, was conduct that contributed in fact to his dismissal. The test is not whether the conduct would have led to the claimant's dismissal but whether it caused or contributed to it. The conduct did contribute to his dismissal (since it was conduct that was taken into account and led to his dismissal). The Tribunal must take it into account.

318. The claimant accepted that he had made a mistake in connection with the incident on 7 December 2018. On the basis of his admission he was guilty of negligence and had made a minor error. The Tribunal does not accept the claimant's agent's submission that this conduct was below the threshold for culpable or blameworthy conduct necessary for a finding of contributory

conduct. It was conduct in respect of which the claimant was culpable or blameworthy that contributed to his dismissal. Although it was manifestly inappropriate to issue a final written warning it was culpable conduct on the facts. It was notable that during the disciplinary process the claimant's representative had accepted that at least a warning should have been issued for negligent conduct, even although the claimant argued a "talking to" may have been more appropriate. From the information before the Tribunal, the Tribunal concludes the conduct was such as to amount to culpable conduct that contributed to his dismissal. Damage was caused by the claimant, albeit (on the claimant's account) minor damage.

319. Given such conduct contributed to his dismissal, the issue is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. The Tribunal accepts the claimant's evidence with regard to the nature of the damage and the error he made. It was a minor error with minor damage which was caused by overcorrection.

320. Applying the legal principles the Tribunal considers that the award should be reduced given the claimant's negligence contributed to his dismissal. The Tribunal considers that it is just and equitable to reduce the award by 10% given the conduct in question (as admitted by the claimant).

321. While the test in respect of contribution is different with regard to the basic and compensatory awards, the Tribunal finds it is just and equitable to apply the same reduction for contributory conduct to both the basic and compensatory awards.

322. It is just and equitable to reduce the compensation due to the claimant by 10% due to his conduct which contributed to his dismissal.

Compensation

323. The parties had agreed the position with regard to remedy in the event that the Tribunal found against the respondent. No issues arose with regard to mitigation or the calculation of sums due to the claimant on a full liability basis.

324. Considering matters it is appropriate to make the following awards.

Basic award

325. The claimant is entitled to a basic award of £2005.40, calculated as follows: 5 years' service x £401.08 (gross weekly pay). Taking account of contribution, the basic award is £2,005.40 less 10% (£200.54) which is £1,804.86.

Compensatory award

326. The claimant is also entitled to a compensatory award. It is just and equitable to award £500 for loss of statutory rights, together with wage loss in the sum of £2,937.23 and pension loss in the sum of £146.86.

327. The total compensatory award is therefore £3,584.09 with the compensatory award being £3,584.09 less 10% contribution (£358.40) which is £3,225.69.

Recoupment

328. The recoupment regulations apply to this award given the claimant was in receipt of a relevant benefit. The prescribed element is £3,084.09 less 10% for contribution (£308.40) which is £2,775.69. The prescribed period is from 17 February 2020 until 4 October 2021. The total unfair dismissal award is £5,030.55. The balance is £2,254.86.

Concluding note

329. The Tribunal wishes to thank the parties for the way in which they worked together to focus the issues in dispute and ensure that the matter proceeded justly and fairly.

Employment Judge: David Hoey
Date of Judgment: 09 October 2021
Entered in register: 19 October 2021
and copied to parties